

Potential Effects of the Presidential Transition on Recent Tax Regulations

February 6, 2017

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The new Trump Administration has generated significant uncertainty about the applicability of a number of tax regulations finalized in the waning days of the Obama Administration. On the day of President Trump's inauguration, Reince Priebus, the Chief of Staff of the White House issued a memorandum to all the heads of executive agencies to pause certain of their rule-making activities until review by the President's new appointees or designees, with very limited exceptions for emergency situations. The Chief of Staff's memorandum directs executive agencies to: (1) refrain from sending any new regulations to the Office of the Federal Register ("OFR") until it has been approved by an agency head appointed by President Trump; (2) withdraw those regulations that had been sent to the OFR but remain unpublished (there is typically a lag of at least one day between a regulation being sent to the OFR and its publication in the Federal Register); and (3) postpone for 60 days the effective date of any regulation that had been published in the Federal Register but had not yet taken effect.

The 60-day postponement does not affect any tax regulations, as there do not appear to be any tax regulations with effective dates that occur after their filing dates. However, four tax regulations stuck in the liminal stage between filing and publication would qualify for withdrawal under the terms of the memorandum:

1. **Final rules under section 7704(d)(1)(E) on the treatment of certain types of income as "qualifying income" to publicly traded partnerships.** These rules were filed on and had an effective date of January 19 and a scheduled publication date of January 24, but had not yet been published in the Federal Register as of the date of the memorandum.
2. **Final and temporary dividend equivalent rules under section 871(m).** These rules were filed on and had an effective date of January 19 and a scheduled publication date of January 24, but had not yet been published in the Federal Register as of the date of the memorandum.
3. **Final and temporary rules making certain technical corrections to the section 385 regulations published in the Federal register on October 21, 2016.** These corrections had a retroactive applicable date of October 21, 2016, an effective date of January 23 and a scheduled publication date of January 24, but had not yet been published in the Federal Register as of the date of the memorandum.
4. **Proposed rules on the new centralized partnership audit regime.** These proposed rules had an effective date of January 1, 2018 and had not yet been scheduled for publication in the Federal Register as of the date of the memorandum.

Regardless of the memorandum from the Chief of Staff, the first three of the above regulations were still published as scheduled on January 24 in the Federal Register. Only the proposed regulations on the new centralized partnership audit regime were withdrawn by the IRS from the Federal Register. The IRS issued a statement regarding the publication of the “qualifying income” and “dividend equivalent” regulations in the Federal Register, explaining that the regulations had come into effect on January 19, prior to the memorandum, and that the Office of Management and Budget (“OMB”) had approved their publication (although it was not stated when this approval had been received). The IRS did not comment on the publication of the corrections to the section 385 regulations. It is unclear what effect, if any, a memorandum from the Chief of Staff of the White House would have on what appears to be, on their face, validly issued regulations.

In addition to the regulations potentially caught up by the White House memorandum, final regulations that came out in the second half of 2016 could also potentially be overturned by Congress as a result of the Congressional Review Act (“CRA”). The CRA provides that Congress may invalidate a rule by issuing a joint resolution of disapproval of “major” regulations—those that the OMB finds are likely to result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or certain “significant adverse effects” on the economy—within 60 days of continuous session (for the House and Senate) of the rule’s publication in the Federal Register or submission to Congress, if such joint resolution is followed by either presidential signature or a two-thirds vote in both houses to override a presidential veto. (Functionally, this process is equivalent to enacting a law, but the CRA provides for expedited procedures.) Joint resolutions of disapproval can be introduced with respect to rules that have already taken effect, as long as they are introduced within the 60 “session” day period described above. In practice, the period of 60 “session” days extends far beyond 60 calendar days, given both houses’ legislative calendars, potentially extending about six months back in time. This means that any regulations finalized in the last six months or so could be subject to invalidation through a joint resolution of disapproval. In theory, this could extend to tax regulations from the second half of 2016 such as the section 385 regulations or the section 367 regulations regarding outbound transfers of foreign goodwill.

However, currently, Congress can only introduce joint resolutions of disapproval pursuant to the CRA for one regulation at a time. Because the process is time-consuming, relatively few rules could be overturned through the CRA process—by some estimates, only about a dozen at most, across all federal agency rules—and it is not clear that tax regulations would be a high priority for invalidation. To make this process more rapid and expansive, a bill under consideration in Congress would amend the CRA to allow these so-called “midnight rules” to be bundled together in groups for disapproval resolutions, as opposed to individually. This bill, the Midnight Rules Relief Act of 2017, was approved by the House on January 4 and is presently pending before the Senate Committee on Homeland Security and Governmental Affairs. While the likelihood of this bill passing the Senate remains unclear, if the bill were to become law, it would have the effect of allowing for *en masse* repeal of agency regulations from the second half of 2016.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our Tax group:

Ed McClellan

+1 202 662 5313

emcclellan@cov.com

Daniel Luchsinger

+1 202 662 5175

dluchsinger@cov.com

Adele Faure

+1 212 841 1186

afaure@cov.com

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